United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 09-902**
	)	**Issued: January 11, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
Thomas Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 16, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective March 16, 2008, on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On August 27, 2005 appellant, then a 55-year-old letter carrier, tripped on a plastic strap protruding from a pallet and fell injuring her right arm, leg and shoulder. The Office accepted that she sustained derangement of the right shoulder joint and right knee, closed fracture of the lower humerus and tear of the right medial meniscus. It authorized arthroscopic right knee surgery that was performed on September 25, 2006. Appellant initially returned to intermittent

work before stopping work on October 21, 2005. The Office paid appropriate wage-loss compensation.

Appellant was treated by Dr. Daniel W. Wilen, a Board-certified orthopedist, beginning August 30, 2005 for right shoulder, elbow and knee injuries from the workplace fall. Dr. Wilen noted an x-ray of the right elbow revealed a fracture of the radial neck and indicated that appellant was totally disabled. In attending physician's reports dated October 5, 2005 to January 2, 2006, he diagnosed internal derangement of the right knee and right shoulder and healed fracture of the radial head. Dr. Wilen opined that appellant was totally disabled beginning October 22, 2005 due to the work injury. On September 25, 2006 he performed a right knee partial medial and lateral meniscectomy, synovectomy of the patellofemoral joint and chondroplasty. In reports dated November 20, 2006 to July 14, 2007, Dr. Wilen noted that appellant continued to have right knee pain and limited range of motion and also developed left knee pain due to her altered gait. He continued to opine that she was totally disabled.

On December 11, 2006 the Office referred appellant to Dr. Robert Israel, a Board-certified orthopedist, for a second opinion. In a January 9, 2007 report, Dr. Israel, discussed her work history and indicated that examination of the right shoulder revealed no deltoid atrophy, normal range of motion, negative impingement sign, no winging of the scapula and no sensory loss. Examination of the right elbow revealed normal range of motion and muscle strength. Examination of the knees showed no joint line tenderness or effusion, normal muscle tone and strength, normal range of motion with no patellofemoral crepitus. Dr. Israel diagnosed resolved sprain of the right shoulder, right elbow and left knee and status post arthroscopy of the right knee healed. He opined that appellant could return to work full time with restrictions for two months and advised that she should be reevaluated in one month. In a August 21, 2007 report, Dr. Israel diagnosed resolved sprain of the right shoulder, right elbow and left knee and status post arthroscopy of the right knee, healed. He opined that appellant's examination was within normal limits and her work-related condition had resolved. Dr. Israel noted that appellant has reached maximum medical improvement and could return to work full time without restrictions.

Appellant continued to submit reports from Dr. Wilen dated February 19 to August 13, 2007, who noted her continued complaints of pain in the right shoulder, elbow and knee and recommended additional physical therapy. Dr. Wilen opined that she was totally disabled since August 30, 2005.

On September 15, 2007 the Office proposed to terminate appellant's compensation benefits based on Dr. Israel's reports.

On October 10, 2007 appellant asserted that she continued to have residuals of her work injury and was totally disabled. She submitted reports from Dr. Wilen dated May 14 and August 14, 2007 who provided a history of injury and subsequent treatment including right knee surgery on September 25, 2006. Dr. Wilen opined that appellant was unable to work and was totally disabled due to decreased range of motion of the right knee.

The Office found conflict of medical opinion existed between Dr. Wilen, appellant's treating physician, who indicated that appellant was totally disabled from work-related residuals, and Dr. Israel, a referral physician, who found that her work injuries had resolved and she could

work full time without restrictions. To resolve the conflict, it referred appellant to Dr. Sanford R. Wert, a Board-certified orthopedist.

In a December 17, 2007 report, Dr. Wert noted appellant's history of injury and provided a detailed review of the medical evidence. On physical examination of the right shoulder, he noted no tenderness and no deltoid atrophy. Dr. Wert noted range of motion deficits for flexion, abduction, internal and external rotation. Examination of the right elbow revealed no tenderness, redness or swelling and normal range of motion. Examination of the right knee revealed tenderness, no swelling, effusion or instability, no varus or valgus deformity, no patellar grinding. Range of motion was somewhat limited. Dr. Wert diagnosed sprain of the right shoulder, healed fracture of the right radial neck and status post arthroscopic surgery of the right knee. He opined that appellant was able to return to full-time light-duty work with restrictions on lifting, carrying, pushing and pulling limited to 25 pounds, reaching above the shoulder with the right upper extremity limited to four hours per day, walking and standing limited to four hours per day, squatting and kneeling limited to two hours per day and no climbing.

Appellant submitted reports from Dr. Wilen dated January 24 and February 25, 2008 opining that she was totally disabled due to her work-related injuries.

On January 17, 2008 the employing establishment offered appellant a position as a modified mail handler, full time, subject to the restrictions set forth by Dr. Wert. The duties included casing flats, preparing (facing and lifting) flats and wrapping and taping damaged letters and flats in the nixie section for four hours per day. The requirements of the position included pushing, pulling and lifting no more than 25 pounds for eight hours per day, reaching above the shoulder with the right upper extremity for four hours per day, walking and standing limited to four hours per day and squatting and kneeling limited to two hours per day. The job was subject to Dr. Wert's limitations, including: lifting, carrying, pushing and pulling limited to 25 pounds, reaching above the shoulder with the right upper extremity limited to four hours per day, walking and standing limited to four hours per day, squatting and kneeling limited to two hours per day and no climbing. Appellant did not respond to the job offer.

In a January 31, 2008 letter, sent to appellant and her attorney at their addresses of record, the Office advised her that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the job or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

On February 29, 2008 the Office received progress notes from Dr. Wilen, dated January 24 and February 25, 2008, who noted continued complaints of right shoulder, elbow and knee pain. Dr. Wilen noted that appellant walked with a limp and her pain was worsening. He further noted that she was awaiting authorization for surgery and remained totally disabled.

In a March 7, 2008 decision, the Office terminated appellant's monetary compensation, effective March 16, 2008, on the grounds that she refused an offer of suitable work. It indicated that she did not respond to the January 31, 2008 letter. The Office noted receiving the January 24 and February 25, 2008 submissions from Dr. Wilen but noted that these were progress reports that did not particularly address continuing work-related disability.

On March 13, 2008 appellant requested reconsideration and asserted that neither she nor her attorney received the Office's January 31, 2008 letter and therefore did not respond. She asserted the Office improperly terminated her benefits. Appellant submitted reports from Dr. Wilen dated March 24 and May 5, 2008, who noted that she continued complaints of right knee and elbow pain.

In a June 6, 2008 decision, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

On September 30, 2008 appellant requested reconsideration and asserted that she did not receive the January 31, 2008 letter from the Office and indicated that, because she did not receive notice, the March 7, 2008 termination decision was null and void. She further noted that she submitted medical evidence supporting total disability and she was not capable of performing the offered job due to her work injuries. Appellant submitted reports from Dr. Wilen dated June 9, 2006 to November 24, 2008, who noted her continued complaints of right shoulder, elbow and knee pain. In a September 24, 2007 report, Dr. Wilen noted findings of weakness, swelling and tenderness of the left knee as a result of her altered gait from her right knee. He diagnosed status post arthroscopic surgery of the right knee due to her work incident, left knee issues which required arthroscopic surgery, restricted motion of the right elbow due to a radial neck fracture and weakness in the right knee joint. Dr. Wilen opined that appellant was totally disabled and required arthroscopic surgery of the left knee and physical therapy.

In a decision dated December 16, 2008, the Office denied modification of the March 7, 2008 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

The implementing regulations provide that an employee, who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[4] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[5]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[6] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[7] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[8]

ANALYSIS

The Office accepted appellant's condition for derangement of the right shoulder joint, right knee, closed fracture of the lower humerus and tear of the right medial meniscus. It terminated appellant's compensation effective March 16, 2008, based on appellant's refusal of suitable work. The Board finds that the Office established that the offered position of January 17, 2008 was suitable.

The Office properly found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Wilen, who indicated that appellant had residuals of her work-related conditions and was totally disabled and the Office referral physician, Dr. Israel, who opined that her condition was resolved and she could return to work full duty without restrictions. Consequently, it referred appellant to Dr. Wert to resolve the conflict.

[4] 20 C.F.R. § 10.517(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

[5] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[6] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[7] *See Connie Johns*, 44 ECAB 560 (1993).

[8] *Mary E. Woodard*, 57 ECAB 211, 217 (2005). *See also* Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.814.4(b) (July 1997).

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[9]

In his December 17, 2007 report, Dr. Wert noted appellant's history, examined her thoroughly and related his clinical findings on examination. He found some limited ranges of motion in the right shoulder while the right elbow revealed no swelling, normal range of motion. Examination of the right knee revealed no redness, swelling, effusion, instability or patellar grinding with some limitation on range of motion testing. Dr. Wert diagnosed sprain of the right shoulder, healed fracture of the right radial neck and status post arthroscopic surgery of the right knee. He opined that appellant was able to return to full-time light-duty work with restrictions of lifting, carrying, pushing and pulling limited to 25 pounds, reaching above the shoulder with the right upper extremity limited to four hours per day, walking and standing limited to four hours per day, squatting and kneeling limited to two hours per day and no climbing.

The Board finds that, under the circumstances of this case, the opinion of Dr. Wert is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant could work a modified position subject to the restrictions he set forth. He reviewed the entire medical record and statement of accepted facts and examined her. Based on this he determined that appellant could work within specified restrictions full time. Dr. Wert's opinion is entitled to special weight and establishes that she could work within such restrictions.

The record reflects that the physical restrictions of the modified position offered to appellant on January 17, 2008 conform with the restrictions, noted above, provided by Dr. Wert. The job offer specifically indicated that she would work in a full-time limited duty-position as a modified mail handler. The Board finds that the physical requirements of the offered position are consistent with the work restrictions set forth by Dr. Wert and that the offered position is medically suitable to appellant's work restrictions.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[10] It properly followed its procedural requirements in this case. By letter dated January 31, 2008, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.[11] Appellant did not respond to the Office's letter. The Office did receive progress notes from Dr. Wilen dated January 24 and February 25, 2008, who noted appellant's continued complaints of pain in the right shoulder, elbow and knee. Dr. Wilen noted that appellant was awaiting authorization for surgery and remained totally disabled. There is no indication that this evidence was submitted in response to the Office's January 31, 2008 letter

[9] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

[10] *See Maggie L. Moore*, *supra* note 5.

[11] *See Bruce Sanborn*, 49 ECAB 176 (1997).

and, in any event, these notes from the physician on one side of a medical conflict are insufficient to show that the offered position was not medically suitable.[12] These treatment notes merely noted appellant's symptoms but did not address the suitability of the offered position. The reports of Dr. Wilen are not sufficient to establish that she could not perform the offered position at the time the job was offered or at any time prior to the termination of benefits. The medical evidence thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position. Therefore, appellant did not submit any medical evidence to show that the offered position was not medically suitable.[13] Thus, under section 8106(c) of the Act, her compensation was properly terminated.

As noted in the Office's procedures, the Office will make the offer of suitable work to the employee and advise him/her of the 30-day period in which to submit a response. If there is no reply to the Office from the employee, as in this case, there is no need for a 15-day notice and the termination decision is issued.[14]

As the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work, the burden then shifted to her to show that her refusal to work in that position was justified.[15]

Following the Office's March 7, 2008 decision, appellant, through her attorney, requested reconsideration. Appellant asserted that neither she nor her attorney received a copy of the January 31, 2008 Office letter. She indicated that because she did not receive proper notice, the termination decision was null and void. Appellant further noted that she has submitted sufficient medical evidence to support that she continued to be totally disabled and was not capable of performing the offered job due to her work injuries. Contrary to her assertions, the record supports that the Office's January 31, 2008 letter was sent to both appellant and her representative at their addresses of record. There is no evidence that the letter was returned to the Office as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[16]

After wage-loss benefits were terminated appellant submitted reports from Dr. Wilen dated March 24 to November 24, 2008, who noted her continued complaints of pain. Similarly, in a September 24, 2007 report, Dr. Wilen diagnosed status post arthroscopic surgery of the right knee due to her work incident, left knee issues, which require arthroscopic surgery, restricted motion of the right elbow due to a radial neck fracture and weakness in the right knee joint. He

[12] *See I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008) (reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict).

[13] *See Les Rich*, 54 ECAB 290 (2003).

[14] Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.814.4(b) (July 1997); *see also Stephen R. Lubin*, 43 ECAB 564 (1992); 20 C.F.R. § 10.516.

[15] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[16] *A.C. Clyburn*, 47 ECAB 153 (1995).

opined that appellant was totally disabled. These reports are insufficient to establish that the position offered appellant was unsuitable as Dr. Wilen did not provide a reasoned opinion explaining how or why her diagnosed conditions prevented her from performing the job duties of the selected position at the time her compensation was terminated on March 7, 2008.

On appeal, appellant asserts that the job offer was not suitable and that she remained totally disabled from employment due to the accepted work injuries and references the numerous reports submitted by Dr. Wilen. The evidence of record fails to support her contention that the offered job was not suitable at the time compensation was terminated. Dr. Wilen's treatment notes merely noted appellant's symptoms but did not address the suitability of the offered position and therefore are insufficient to show that the offered position was not medically suitable. Appellant also contends that the termination of benefits was improper because neither she nor her representative received a copy of the January 31, 2008 letter from the Office and therefore did not respond. As noted above, under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[17] The record reflects that the notice was mailed to the address of record for both appellant and her representative and there is no evidence it was returned as undeliverable. Appellant asserts that she sustained injuries and conditions in addition to those accepted by the Office and that her claim should be expanded to include all consequential injuries. The Board notes that the Office has not issued a final decision with regard to any allegation of a consequential injury and therefore the Board does not have jurisdiction over any such matter on the present appeal.[18]

CONCLUSION

The Board finds that the Office met the burden of proof in terminating appellant's disability compensation for refusal of suitable employment. Therefore, the Board finds that the Office properly invoked the penalty provision of 5 U.S.C. § 8106(c).

[17] *Id.*

[18] *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16 and March 7, 2008 are affirmed.

Issued: January 11, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board